



Indiana Judicial Nominating Commission
30 South Meridian Street
Suite 500
Indianapolis, IN 46204
(317) 232-4706

APPLICATION
FOR THE
INDIANA TAX COURT

(SEE INSTRUCTIONS)

Deadline – Monday, September 20, 2010

I. Provide your:

A. Full legal name and any former names.

Andrew Wade Swain

B. Current home and office addresses, including email addresses and telephone numbers.

Home:

Work: 302 West Washington Street
IGCS Fifth Floor
Indianapolis, Indiana 46204
(317) 232-6287 (work)
andrew.swain@atg.in.gov

C. Date and place of birth.

April 10, 1962
Marion, Indiana
Grant County

II. Complete a State Police release form printed on green paper. Include the release only with the original application and not with the copies.

I have completed the form and attached it to the original application. I have also attached to the original application the "Indiana Commission on Judicial Qualifications Statement of Economic Interests."

- III. Attach a recent photograph of you to the front of the original application and to each copy of your application.

I have attached a photograph to the application.

- IV. A. State in what county you currently reside and since what date.

Hamilton County, Indiana: From August 2004 to present.

- B. List all previous counties of residence, with dates.

City and County of Denver, Colorado: July 1997 to August 2004.

Hamilton County, Indiana: July 1996 to July 1997.

Marion County, Indiana: August 1988 to July 1996.

Monroe County, Indiana: August 1980 to August 1988 (college and law school).

Grant County, Indiana: April 10, 1962 (birth) to August 1980.

- C. When were you admitted to the Indiana Bar?

October 14, 1988

- D. Are you currently on active status?

Yes

- E. What is your attorney number?

14354-49

- V. A. List below all colleges and universities you attended other than law schools. Attach a certified transcript from each to the original application and attach copies of each transcript to each application copy. (If your social security number is on your transcripts, redact it before copying.)

School

Dates Enrolled

Degree or Certificate

Indiana University; August 1980 to December 1985
Bloomington, Indiana

B.A. in
Zoology and
Anthropology

(See Tab 1.)

B. List below all law schools and post-J.D. programs attended. Attach a certified transcript from each to the original application and attach copies of each transcript to each application copy. (If your social security number is on your transcripts, redact it before copying.)

<u>School</u>	<u>Dates Enrolled</u>	<u>Degree and Class Rank</u>
Indiana University School of Law; Bloomington, Indiana	August 1986 to May 7, 1988	J.D. (rank unknown)

(See Tab 2.)

University of Denver Graduate Tax Program; Denver, Colorado	August 1997 to August 14, 1998	LL.M. in Taxation (rank unknown)
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(See Tab 3.)

C. Describe any academic honors, awards, and scholarships you received and when.

In law school, I received the highest grade in my criminal law externship supervised by Professor F. Thomas Schornhorst. Despite the law school not offering an “A star” award for externships, Dean Leonard Fromm placed a letter in my student file recognizing my achievement.

VI. A. Provide your employment history since graduation from college, including titles or positions, locations, and dates.

Chief Counsel to the Indiana Attorney General (Steve Carter and Gregory Zoeller administrations), Office of the Attorney General; Indianapolis, Indiana. August 2004 to present.

Assistant Attorney General, Office of the Attorney General; Denver, Colorado. August 2003 to August 2004.

Tax Manager, KPMG, LLP (and Arthur Andersen prior to merger of State and Local Tax Group); Denver, Colorado. October 1999 to August 2003.

Senior Assistant City Attorney, Denver City Attorney's Office Division of Land Use and Revenue; Denver, Colorado. December 1998 to October 1999.

Law Clerk, Rothgerber, Johnson & Lyons LLP; Denver, Colorado. June 1998 to January 1999.

Associate Attorney, Frost & Hugon; Indianapolis, Indiana. June 1994 to June 1997.

Legal Writing Instructor, Indiana University—Purdue University Indianapolis; Indianapolis, Indiana. Paralegal program. December 1991 to April 1993.

Conflict Public Defender, Marion County Public Defender Agency; Indianapolis, Indiana. April 1990 to May 1994.

Associate Attorney, Lee & Clark; Indianapolis, Indiana. April 1990 to May 1994.

Deputy Public Defender, Office of the State Public Defender; Indianapolis, Indiana. August 1988 to April 1990.

B. If applicable, describe the nature and extent of your practice of law, present and former, and provide the names of your partners, associates, office mates, and employers.

In October 1988, I began the practice of law as a criminal defense attorney. I first worked for Susan Carpenter, the Chief Public Defender at the Office of the State Public Defender. I handled a wide range of post-conviction petitions including a death penalty case and various other murder cases. Wanting to defend criminal defendants at the outset of the proceedings rather than after the fact, I began work for Lee & Clark, a firm owned by Nathaniel Lee and Tim Clark. I handled the vast majority of criminal cases that it received. At the firm, I worked with Kathryn Kuehn and Marcia Cossell. I tried and handled many serious felony and misdemeanor cases including murder, rape, robbery, and DUI. Some of the cases that I litigated which resulted in published appellate decisions include the following:

Lott v. State, 690 N.E.2d 204 (Ind. 1997)

S.A. v. State, 654 N.E.2d 791 (Ind. Ct. App. 1995)

Barham v. State, 641 N.E.2d 79 (Ind. Ct. App. 1994)

D.D.J. v. State, 640 N.E.2d 768 (Ind. Ct. App. 1994)

Fair v. State, 627 N.E.2d 427 (Ind. 1993)

As part of my private criminal defense practice, I worked as a part-time public defender defending cases that the public defender could not defend because of a conflict. I did this work in both the Marion County and federal courts. I also taught legal writing as an instructor for the paralegal program offered by Indiana University—Purdue University Indianapolis (IUPUI).

In 1994, I decided to change direction in my legal career. I began working for Frost & Hugon in Indianapolis. The firm was owned by Victor Frost and Bruce Hugon. I also worked with an associate, Cindy Klem. The firm defended Class I (e.g., Amtrak, CSX, and Conrail), regional, and short line railroad companies in personal injury cases that involved crossing accidents and employee injuries under the Federal Employer's Liability Act. I worked on cases filed in both federal and state courts. I handled every aspect of the litigation process. The following are the cases I litigated that resulted in published appellate decisions:

Nat'l R.R. Passenger Corp. v. Everton by Everton, 655 N.E.2d 360
(Ind. Ct. App. 1995)

Herriman v. Conrail Inc., 883 F.Supp. 303 (N.D. Ind. 1995)

In July 1997, I again decided to change direction in my legal career, and I moved to Denver, Colorado to pursue an LL.M. in Taxation at the University of Denver's Graduate Tax Program. Though I had enjoyed the areas of law in which I practiced, I wanted to combine my litigation and appellate experience with what I viewed as a more scholarly legal pursuit and one of deeper importance—that is, tax law. What convinced me of its importance is its significant place in federal and state law, and federal and state litigation. Few areas of law simultaneously affect both the government and the citizenry in equally significant ways. The government needs to maximize taxes in order to survive while citizens and businesses need to minimize them in order to survive. Dozens of publications are devoted to educating tax attorneys and tax professionals about tax law, tax planning, and developments in both. Based on all this, it appeared to me that tax would be an exciting area to which to devote my legal career. I was right.

While attending the Graduate Tax Program, I worked with James R. Walker, senior tax partner with Rothgerber, Johnson & Lyons, as a law clerk preparing memoranda regarding various federal tax issues and meeting with clients. When I worked with Walker, I had not yet received my Colorado law license. In August 1998, I graduated and, in December 1998, began working as a contract attorney with the Denver City Attorney's Office. My supervisor was Donald Wilson, followed by David Broadwell. I defended

Denver against sales and real property tax protests. I also handled bankruptcy cases.

I next worked at Arthur Andersen, which was, at the time, one of the “Big 5” accounting firms. Andersen was purchased by KPMG, another “Big 5” accounting firm. At both I worked as a tax manager in the state and local tax (SALT) division specializing in controversies (*i.e.*, audit defense) and corporate transactions. As part of my controversy duties, I conducted hearings before the Colorado Department of Revenue's Executive Director and hearing officers appointed by the various home-rule cities. I also did controversy work outside Colorado. I provided tax consulting as it pertains to business formation and ongoing operation, as well as mergers and acquisitions. My supervising SALT partner was Rod Martinez.

In August 2003, I left KPMG to work as an assistant attorney general with the Office of the Colorado Attorney General. With that office, I prosecuted tax cases in civil court on behalf of the Colorado Department of Revenue. I also handled bankruptcy proceedings for the Division of Property Taxation and the Public Utilities Commission. My direct supervisor was Larry Williams. The attorney general was Ken Salazar. My primary client was Art Crespin, Senior Conferee for the Colorado Department of Revenue.

In August 2004, I left Colorado to return home to Indiana. I began working for Steve Carter in the Office of the Indiana Attorney General as the Chief Counsel overseeing all state tax litigation in Indiana. I was tasked with rebuilding the Tax Litigation Section and turning it into an effective SALT law firm. The tax section civilly defends tax cases on behalf of the Indiana Department of Revenue and Indiana's County Assessors. In some instances, the tax section criminally prosecutes tax evaders. When Gregory Zoeller became attorney general, I was tasked with merging the Tax Litigation Section into a larger division called the Revenue Division. This new division consists of the Tax Litigation Section, the Collections and Bankruptcy Section, State Board of Accounts Public Corruption Section, and the Tobacco Enforcement Section. I had to improve all of the new sections' systems and procedures, as well as make numerous financial cuts in order to reduce costs. I also instituted a process to recover attorney fees in order to recoup litigation costs. I report to the Chief Deputy, Gary Secrest. My employees include John Snethen, Jess Regan, Tim Schultz, Nancy Hauptman, and Andrew Asma. Twenty-one people report to me. I have attached to the application a list of some of the Indiana cases in which I have been involved while overseeing the Revenue Division that resulted in published opinions. (**See Tab 4.**)

If I receive the great honor of becoming the next judge of the Indiana Tax Court, I will bring my excitement about and devotion to tax law to the court.

I will focus my attention on court administration and judicial processes in order to decrease the time it takes to issue opinions. It is important that both taxpayers and the government receive tax opinions in a timely manner without the quality of those opinions being compromised. Businesses and taxpayers need tax opinions in order to, for example, know the tax laws and plan tax strategies that minimize taxes. They also need timely issued opinions in order to free monies that have been reserved to pay potential tax liabilities. If a tax dispute involves an audit, for example, the state needs the dispute resolved in a timely manner so that it can get its money to pay for its infrastructure. It also needs opinions issued in a timely way so that it can collect the taxes “now,” when the taxpayer is still in business, rather than “later,” when the business has closed its doors. Promptly issuing quality tax decisions will be my number one goal as the new tax court judge. My extensive experience in both the private and public tax sectors gives me a unique understanding of the importance of taxes to both sectors and an appreciation of the legitimacy of both sectors’ concerns and positions.

C. Describe the extent of your jury experience, if any.

As a trial attorney, I conducted fifteen jury trials, two of them before the Southern Federal District Court of Indiana. As a trial attorney, I conducted over one hundred bench trials and many more hearings.

D. If applicable, describe the nature and extent of your judicial experience, including a description of your experience presiding over jury trials, if any.

Many years ago, I occasionally sat as a judge pro tem for Judge Charles Dieter in the Marion County Probate Court. Also years ago, I occasionally sat as a Judge pro tem in the Marion County Superior Court, Criminal Division 6. In both positions, I handled daily routine matters (bail hearings, discovery matters, pre-trial conferences, and guardian ad litem matters).

VII. A. If applicable, list by caption, case number, and filing date up to five of your trial or appellate briefs and/or written judicial opinions.

1. *McLane W., Inc. v. the Colo. Dep’t of Revenue*; “Brief of the Respondents in Opposition to Petition for Writ of Certiorari” (Case No. 05-1294). Filed with the U.S. Supreme Court on June 7, 2006.
2. *Goldstein, Mel, et al. v. Ind. Dep’t of Local Gov’t Fin.*; “The Department’s Motion to Dismiss and Supporting Memorandum” (Case No. 49T10-0709-TA-45). Filed with the Indiana Tax Court on October 3, 2007.
3. *MBNA Am. Bank, N.A. & Affiliates v. Ind. Dep’t of State Revenue*; “Respondent’s Motion for Summary Judgment and Brief in Support” (Case

No. 49T10-0506-TA-00053). Filed with the Indiana Tax Court on February 2, 2007.

4. *Miller Brewing Co. v. Ind. Dep't of State Revenue*; Appellant's Brief (Case No. 49S00-0711-TA-00553). Filed with the Indiana Supreme Court on November 13, 2007.
5. *Ind. Dep't of State Revenue v. Miller Brewing Co.*; "Indiana Department of State Revenue's Petition for Rehearing" (Case No. 49T10-0110-TA-82). Filed with the Indiana Tax Court on August 24, 2005. Also, the resulting Petition for Review filed with the Indiana Supreme Court on November 18, 2005.

B. If applicable, list up to five legislative drafts or court rules you have written or to which you contributed significantly. Refer to them by official citation, by date, and by subject matter.

1. As a member of the executive council for the tax section of the Indiana State Bar Association, and while serving on the council's Tax Court Liaison Committee, I made numerous suggestions regarding improvements to the Tax Court Rules and the Supreme Court Rules as they apply to reviewing tax court decisions. I supported and reviewed Ind. Tax Court Rule 18 regarding mediations in tax court, and suggested many modifications, several of which were adopted. For example, because I wanted mediation to be inexpensive for the state, I suggested the use of senior judges for mediation. *See* Tax Ct. R. 18 (D). Also, because Ind. Code § 4-6-2-11 mandates that both the attorney general and the governor must approve all compromises of "claim[s] in favor of the state," I insisted that Ind. Alternative Dispute Resolution Rule 2.7(B)(2), which requires an attorney or representative of the state with settlement authority to be present at mediation, does not apply to tax court mediation. *See* Tax Ct. R. 18(E). It was impossible to comply with the Title 4 mandate if mediation could not occur without real-time settlement authority.
2. I recently recommended to the liaison committee that it suggest a modification to Ind. Tax Court Rule 4(B)—the rule that involves appeals from the Indiana Board of Tax Review (IBTR). Currently, when a taxpayer files an original tax appeal from an IBTR decision, the opposing party has to file an answer as if responding to a complaint. This is true even though the tax court acts as an appellate tribunal when reviewing IBTR decisions. The court then conducts a pre-hearing conference and sets a briefing schedule. I suggested that appeals from the IBTR should proceed as does any appeal to the Indiana Court of Appeals from an administrative law tribunal. *See* Ind. Appellate Rule 5.C. In other words, the process for appealing an IBTR decision should be no different than that for appealing an ALJ decision. The

current rules also permit the anomalous use of the summary-judgment provisions in Ind. Trial Rule 56 in an appellate review of an IBTR decision. I strongly suggested rule changes that prevent the use of summary judgment in an appeal.

We are seeing more tax appeals from decisions made by the Department of Local Government Finance (DLGF) involving county budgets. In these cases, the DLGF reviews disputes in a manner similar to the IBTR, producing an evidentiary record that is transmitted to the tax court for review. The tax court's rules, specifically Tax Ct. R. 4, are not written to efficiently handle appeals from DLGF decisions. I recently suggested to the liaison committee that Tax Ct. R. 4 must be modified to accommodate these appeals.

3. I effected an important change to refunds of inheritance taxes. Under Ind. Code § 6-4.1-9-1(a), a taxpayer can seek a refund of inheritance taxes that have been erroneously or illegally collected. Under previous law, the interest for the refunded amount attached in every instance and was calculated from the date the tax was paid, not the date on which the refund was requested. Often an estate that owed Indiana inheritance taxes would overpay the taxes immediately after the decedent's death and before the probate court had determined the amount of taxes due. The estate would wait to file the inheritance-tax return in order to delay the process to maximize the interest recouped on the refund. The Department of Revenue would refund the taxes along with interest calculated back to the date the estimated taxes were paid. In essence, estates were using the state as an investment bank. In order to end this, I suggested to the Department that it seek a legislative fix. I submitted to the Department the statutory change that became Ind. Code § 6-4.1-10-1(c). This provision limits the interest on a refund of inheritance tax to the date when the estate filed the claim for refund and, as a result of that filing, notifies the Department that an overpayment of inheritance tax has occurred. The change also gives the Department 90 days to review the claim for refund and to avoid the payment of any interest if the Department determines that the refund is warranted and pays it within the time period. This statutory change made the inheritance tax refund provision comport with the other tax refund provisions.
4. On behalf of my office, I drafted modifications to Ind. Code § 33-26-7-1, which pertains to when counties can hire outside counsel to prosecute property tax appeals before the Indiana Tax Court. I made sure that this provision comported with Ind. Code § 4-6-2-11, which requires the attorney general and the governor to approve all compromises that affect the state, and Ind. Code § 4-6-5-3, which requires the attorney general to authorize any agency, including counties, to hire outside counsel to represent it before the tax court. After the General Assembly adopted my modifications to Ind. Code § 33-26-7-1, the Assembly ordered the Attorney General's Office to

prepare a report discussing the office's representation of counties in property tax appeals. I prepared this report, entitled "OAG's Gatekeeper Role in Litigating Property Tax Cases," and, on October 5, 2009, presented it to the Committee on State Tax & Financing Policy. (I have attached a copy of the report.) (**See Tab 5.**)

C. If applicable, list up to five of your contributions to legal journals or other legal publications. Provide titles, official citations, and a brief description of the subject matter.

1. "Tax Ills Behind the Mills—the Advancement of Puppy Protection," *57 St. Tax Notes (TA)* 565 (Aug. 30, 2010).

This article discusses the use of advanced tax enforcement techniques to combat a specific type of business that operates in the underground economy—that is, the puppy mill.

2. Chapter 30, "Enhanced Tax Collection Techniques and Criminal Tax Issues and Procedures;" Chapter 6, "Gross Receipts Taxes," and Section 5.05, "Taxation of Financial Institutions," in Chapter 5: "Corporate Income, and Franchise Tax Treatment of Special Entities," in *Bender's State Taxation: Principles & Practice* in *Bender's State Taxation: Principles & Practice* (Charles W. Swenson, ed., LexisNexis Matthew Bender, June 2010).

I have written two chapters, and part of a third chapter, which appear in a LexisNexis state tax treatise. Chapter 30 examines three aspects of advance tax enforcement techniques. The first aspect is the identification of underground businesses and the investigative techniques used to demonstrate the underreporting of taxes. The second is the use of tax collection techniques to disrupt or close illegal businesses. And the third aspect involves the prosecution of state tax crimes and the various issues that arise. Chapter 6 examines state and local use of gross receipts taxes. The portion of Chapter 5 that I wrote examines the states' imposition of financial institutions taxes.

3. "Paying Their Fair Share: the Hidden Lesson of *Complete Auto* and *Quill*," *46 St. Tax Notes (TA)* 749 (Dec. 10, 2007) (with John D. Snethen).

This article examines the U.S. Supreme Court's often overlooked discussion in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in which the Court says that *Quill* cannot be interpreted as saying that the Commerce Clause of the U.S. Constitution prohibits interstate commerce from paying its fair share of state taxes. The Court's discussion provides support for the proposition that states can impose other taxes on out-of-state taxpayers even though they have only an economic presence in the state.

4. “The Taxability of Computer Software in Colorado,” 32 *Colo. Law.* 91 (Dec. 2003).

This article discusses the complexity surrounding the imposition of sales and use taxes on software purchased and used in Colorado and its home-rule cities.

5. “Sales and Use Tax Consequences of Reorganizations, Separations, and Acquisitions,” 32 *Colo. Law.* 81 (May 2003).

This article examines the often unexpected sales and use tax consequences associated with reorganizations, separations, and acquisitions—that is, business transactions that are generally excluded from having federal tax consequences.

- E. Include with your application copies of any four of the written materials listed above in Section VII. A., B., and C. (An adequate sampling can usually be supplied in 75 pages or less.)

I have attached the following four written materials to the application:

1. Chapter 30, “Enhanced Tax Collection Techniques and Criminal Tax Issues and Procedures,” in *Bender’s State Taxation: Principles & Practice* (Charles W. Swenson, ed., LexisNexis Matthew Bender, June 2010). (**See Tab 6.**)
2. *Goldstein, Mel, et al. v. Ind. Dep’t of Local Gov’t Fin.*; “The Department’s Motion to Dismiss and Supporting Memorandum” (Case No. 49T10-0709-TA-45). Filed with the Indiana Tax Court on October 3, 2007. (**See Tab 7.**)
3. *McLane W., Inc. v. the Colo. Dep’t of Revenue*; “Brief of the Respondents in Opposition to Petition for Writ of Certiorari” (Case No. 05-1294). Filed with the U.S. Supreme Court on June 7, 2006. (**See Tab 8.**)
4. “Sales and Use Tax Consequences of Reorganizations, Separations, and Acquisitions,” 32 *Colo. Law.* 81 (May 2003). (**See Tab 9.**)

- F. Describe the nature and extent of any *pro bono* legal services you have contributed.

Often, when I practiced as a criminal defense attorney, if I thought that a case presented a significant legal question, I handled the appeals for free. For example, in *Fair v. State*, 627 N.E.2d 427 (Ind. 1993), because I believed the client’s case presented a significant search and seizure issue, and, because my

client had limited funds, I managed to get the court to find him indigent in order to have the court pay the cost of preparing the record and filing it. I litigated the case before the Indiana Court of Appeals and the Indiana Supreme Court. I won the case, convincing the Indiana Supreme Court that the search was illegal (during which the police found a sawed-off shotgun in my client's car). *Fair* remains the leading case on inventory and pretext searches.

G. Identify the five most significant legal matters entrusted to you whether as a judge or lawyer, and describe why you believe them to be so.

It is difficult to identify the five most significant legal matters entrusted to me during my twenty-two-year career as an attorney. When I practiced as a criminal defense attorney, I was entrusted with my clients' freedom and reputations, both of which are inherently significant. For example, in *Barham v. State*, 641 N.E.2d 79 (Ind. Ct. App. 1994), I convinced the Indiana Court of Appeals to reverse my client's voluntary manslaughter conviction because the trial court denied him his Sixth Amendment right to the counsel of his choice. At page 82, footnote five, of the opinion, the appellate court quoted favorably from my reply brief.

When I worked in railroad law and represented Amtrak, CSX, Conrail (before it merged with CSX), and Indiana's short-line rail companies, I handled cases with significant financial implications for my clients. For instance, In *Herriman v. Conrail*, 887 F. Supp. 1148 (N.D. Ind. 1995), I argued that, pursuant to Indiana's Child Wrongful Death Act, Ind. Code § 34-1-1-8(f), a plaintiff's recovery for the loss of love and companionship caused by the death of a child is limited to the child's majority rather than, pursuant to subsection (g), the life expectancy of the child's last surviving parent. The federal district court agreed with my resolution of the ambiguity in the Act and granted my client a summary judgment on the issue. This decision prompted the plaintiff to seek a settlement that significantly benefited my client financially.

When employed as a state and local tax consultant for KPMG and Arthur Andersen, I was routinely entrusted with complex legal tax matters. For example, I worked with an Indian tribe in San Diego to structure, under California sales-tax law, purchases free from state and local sales taxes of building materials and supplies used to construct the tribe's hotel and casino on its reservation. I worked with a Colorado power company to recover millions in refunds by linking its production of electricity to Colorado's manufacturing exemption. I worked with wealthy Colorado residents to structure purchases of aircraft and other luxury vehicles free from any state or local sales taxes. I achieved this in a way that could withstand an audit conducted by any taxing authority. I saved many other clients, such as a Colorado art college and a Colorado power company, millions in taxes by challenging tax assessments issued by Colorado and the state's various home-rule cities.

As chief counsel overseeing the Revenue Division of the Indiana Attorney General's Office, I have been entrusted with many significant matters, both legal and non-legal. For example, in August 2004, Indiana Attorney General Steve Carter gave me the responsibility of reinventing the office's Tax Litigation Section. I had to interview and hire tax attorneys and install new systems, procedures, and practices. I have attached a reorganization plan entitled "Tax's Management Areas" that I prepared when I joined the Indiana Attorney General's Office. (**See Tab 10.**) In December 2009, Attorney General Gregory Zoeller again tasked me with reorganizing an area of the office. I was asked to combine the Tax Litigation Section with collections, tobacco enforcement, public corruption litigation, and bankruptcy and form the Revenue Division. It is this division that I currently oversee. Attorneys General Carter and Zoeller asked me to organize, execute, and oversee the office's prosecution of six tax evaders. These prosecutions had the dual effect of combating the underground economy and preventing bad business operators from harming Indiana consumers. I recently wrote an article for State Tax Notes describing the methodology I developed to combat a specific type of business that operates in the underground economy—that is, the puppy mill. The article, "Tax Ills Behind the Mills—the Advancement of Puppy Protection," 57 *St. Tax Notes (TA)* 565 (Aug. 30, 2010), has been attached to this application. (**See Tab 11.**) This article was immediately noticed by Janet Novack, a columnist for *Forbes Blogs*. I have attached her article after mine.

In addition to what I have outlined above, the following cases are five of the significant legal matters entrusted to me during my career as a government tax attorney:

1. In *MBNA Am. Bank, N.A. & Affiliates v. Ind. Dep't of State Revenue*, 895 N.E.2d 140 (Ind. Tax Ct. 2008), I won a summary judgment against MBNA America Bank. The Indiana Tax Court recognized the concept of economic nexus and permitted Indiana to impose its financial institutions tax on MBNA because it had an economic presence in the state. The court rejected MBNA's argument that, pursuant to the U.S. Supreme Court's holding in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), MBNA must have a physical presence in Indiana before the state can impose an income tax on it. This case had multi-state tax significance because tax and appellate courts across the U.S. have struggled with this issue. In a recent article, Judge Thomas G. Fisher discussed his retirement from the Indiana Tax Court and the significant cases during his tenure. He made special mention of his decision in *MBNA*, saying that:

[*MBNA* was] a first impression issue a couple years ago when [I] ruled a bank didn't need to have a physical presence in the state to be subject to the Indiana Financial Institutions Tax. That's a national issue [I] hope[] the U.S. Supreme Court will consider at some point.

See Michael W. Hoskins, “Indiana’s Tax Judge to Retire,” *The Indiana Lawyer.Com* (Aug. 18, 2010) (available at <http://www.theindianalawyer.com/indianas-tax-judge-to-retire/PARAMS/article/24529>).

2. In *Goldstein v. Ind. Dep’t of Local Gov’t Fin.*, 876 N.E.2d 391 (Ind. Tax Ct. 2007), I defended Governor Mitchell E. Daniels, the Indiana Department of Local Government Finance, the Indiana Department of State Revenue, and the State of Indiana before the Indiana Tax Court. My clients were sued by Mel Goldstein, who challenged the legality of the votes that raised county income taxes, the constitutionality of the governor’s directive extending the deadline for counties to adopt local option income taxes, and the constitutionality of other property assessment and taxation practices. This lawsuit came at the height of the property tax protests in Indiana. I filed a motion to dismiss, arguing that the petitioner did not have standing to assert the challenges specified in his original tax appeal, the petitioner did not exhaust his administrative remedies before filing the tax appeal, and the tax court did not have jurisdiction to decide the tax appeal. The hearing was held in the Indiana Supreme Court’s courtroom because Judge Fisher granted the press’s request to record and broadcast the proceedings. I have attached to the application a picture taken by Channel 6 News of me arguing the case. (**See Tab 12.**) I convinced the tax court to dismiss the case. The favorable decision made my clients very happy.
3. I have combined two cases, *Miller Brewing Co. v. Ind. Dep’t of State Revenue*, 903 N.E.2d 64 (Ind. 2009), and *Lafayette Square Amoco, Inc. v. Ind. Dep’t of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007), to illustrate the importance of winning cases that, though involving smaller tax amounts, aid the Indiana Department of State Revenue when it audits taxpayers and issues assessments. *Miller* involved the question of whether the Department can re-litigate a tax issue involving one taxpayer in tax years subsequent to an adverse decision by the Indiana Tax Court, or whether the decision collaterally estops the department from re-litigating the issue. *Lafayette Square Amoco* involved the evidence a taxpayer needs to present to the tax court in order to rebut the presumption of correctness afforded an assessment issued by the department, and based on the best information available—in other words, when the assessment is based on an educated guess. The department considered these wins significant. *Miller* gives the department and taxpayers the ability to re-litigate tax issues if it is believed that the tax court decided them incorrectly. *Lafayette Square Amoco* prevents taxpayers from refusing to cooperate with an audit and failing to provide adequate tax records to the auditor.
4. In *McLane W., Inc. v. Dep’t of Revenue of the State of Colo.*, 126 P.3d 211 (Colo. Ct. App. 2005), *cert. denied*, 549 U.S. 810 (2006), I won a summary

judgment against a tobacco products distributor in Colorado. McLane sought a \$10,163,024.33 (plus interest) tax refund from the state, alleging that Colorado law permitted it to use a lesser manufacturer's purchase price rather than a greater supplier's purchase price to calculate its tax liability. A Colorado district court agreed with my argument that McLane had properly calculated its tax, and it denied the refund.

I was assigned this case on my second day of work for the Colorado Attorney General. The case was in shambles. McLane had filed for a summary judgment. The assistant attorney general who handled the case before me had been fired. The state had extended the deadline for its response to the summary-judgment motion three times. A trial date was a month away when I received the case, and discovery deadlines had expired without the state having sought any discovery. To make matters worse, during a deposition, McLane had managed to get a revenue conferee to make admissions against the state's legal argument in the case. In less than a month, I managed to develop a winning legal theory, respond to McLane's motion, and successfully resolve all the procedural hurdles.

The importance of this case to Colorado and the work that I did on it is evidenced by the fact that, after I moved to Indiana to work in the Office of the Indiana Attorney General, I was appointed a Special Assistant Colorado Attorney General in order to brief and argue the case before the Colorado Court of Appeals. The appellate court affirmed the district court's decision, and the Colorado Supreme Court denied *certiorari*. I also handled the opposition to *certiorari* to the Colorado Supreme Court. McLane filed a Petition for Certiorari with the U.S. Supreme Court. Colorado's Attorney General, John W. Suthers, again appointed me to brief and litigate the case on his behalf. On October 2, 2006, the Court denied *certiorari*.

5. In *United Air Lines, Inc. v. City and Co. of Denver*, 973 P.2d 647 (Colo. Ct. App. 1998), *aff'd per curiam*, 992 P.2d 41 (Colo.), *cert. denied*, 530 U.S. 1274 (2000), I convinced the Colorado Supreme Court to dismiss the airline's claim that Denver's taxing scheme violated the dormant Commerce Clause of the United States Constitution because Denver's tax code allegedly failed to give a credit for state and local taxes paid to another state. The court so utterly rejected the airline's claim that it first noted its dismissal of the case in a footnote to another case. *See Gen. Motors Corp. v. City and Co. of Denver*, 990 P.2d 59, 70 n.10 (Colo. 1999). The court later issued a brief *per curiam* opinion dismissing the airline's case. This win for Denver resulted in a payment of taxes and interest in excess of approximately \$20,000,000. I wrote an article about my work on this case for the Colorado bar journal called "Home Rule Use-Tax Credits and Interstate Multi-Jurisdictional Transactions," 30 *Colo. Law.* 79 (May 2001). This was my first tax article.

H. Provide the names, addresses, and telephone numbers of three attorneys who have been your professional adversaries in your practice or who have litigated substantial cases in your court and who would be in positions to comment on your qualifications for appointment to the Indiana Tax Court.

1. Larry Stroble

Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, Indiana 46204-3535
(317) 231-7248

2. Randal J. Kaltenmark

Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, Indiana 46204-3535
(317) 231-7741

3. Francina A. Dlouhy

Baker & Daniels
300 N. Meridian Street
Indianapolis, Indiana 46204
(317) 237-1210

VIII. A. Describe your efforts, achievements, or contributions (including written work, speeches, or presentations) toward the improvement of the law, the legal system, or the administration of justice.

In order to counter the underground economy in Indiana, I have worked to develop a new tax investigation and prosecution effort performed by the Office of the Indiana Attorney General. The underground economy and the crime of tax evasion are critical issues for Indiana, particularly during this time of economic distress. The underground economy has been in existence as long as its legitimate counterpart. Economists estimate that the underground economy in the United States generates between \$2 trillion and \$2.25 trillion per year in unreported income or 13% of the U.S.'s gross domestic product. Up to 75% of all cash transactions go unreported. This means that state and local taxing jurisdictions lose billions of tax dollars from businesses operating in the underground economy. The underground economy supports any number of overseas activities, including covert wars, terrorism, drug production, and slavery rings. These illegal activities require an abundance of untraceable cash, preferably from a nation with a strong government and stable legitimate economy.

In the last year, on behalf of my office, I successfully planned and supervised the prosecution of six Indiana tax evaders. This effort resulted in a total of five felony convictions and three misdemeanor convictions. I am a member of the Indiana Financial Crimes Working Group, organized by the U.S. Department of Justice, and the FTA Criminal Investigations Working Group, organized by the Federation of Tax Administrators. I have spoken at several conferences regarding the use of enhanced tax enforcement techniques to combat the underground economy. Those conferences include the following:

1. 2010 FTA Compliance and Education Workshop, *Targeting Unpopular Criminals to Battle the Underground Economy* (Atlanta, Ga.; Fed'n of Tax Adm'rs; Feb. 21-24, 2010).
2. Advance State and Local Tax Institute, *Using State Taxes to Combat the Underground Economy* (Wash. D.C.; Georgetown Law CLE Program; May 20-21, 2010).
3. 2010 FTA Annual Summer Conference, *Enhanced Enforcement Techniques to Address the Underground Economy* (Atlanta, Ga.; Fed'n of Tax Adm'rs; June 6-9, 2010).
4. Indiana Bar Association Animal Law Section Luncheon: Legal Issues Affecting Companion Animal (Re)Production, *Tax Ills Behind the Mills: Using State Taxes to Combat Indiana's Puppy Mills* (Indianapolis, Ind.; Ind. Bar Ass'n, Aug. 18, 2010).
5. National Association of Attorneys General (NAAG); National Attorney Generals' Training Institute (NAGTRI); States' Association of Bankruptcy Attorneys (SABA) Bankruptcy from a Government Perspective Seminar, *Advanced Collection Issues: Dealing with the Recalcitrant Taxpayers* (Santa Fe, NM; Sept. 12-15, 2010).

I have also written a treatise chapter for LexisNexis regarding the use of enhanced tax enforcement techniques to combat the underground economy. It is entitled "Chapter 30, Enhanced Tax Collection Techniques and Criminal Tax Issues and Procedures," in *Bender's State Taxation: Principles & Practice* (Charles W. Swenson, ed., LexisNexis Matthew Bender, June 2010) (*see Tab 6*). Two articles I have written on this topic include "Tax Ills Behind the Mills—the Advancement of Puppy Protection," 57 *St. Tax Notes (TA)* 565 (Aug. 30, 2010) (*see Tab 11*); and "Ignorance, Bliss, and Ignoring Indiana Tax Law," ___ *Res Gestae* ___ (Ind. State Bar Ass'n, ___ 2010) (publication pending).

In order to improve the understanding of the law and the legal system, I have taught numerous other continuing legal education classes in addition to the ones listed above. They include the following:

1. Colorado Association of Municipal Tax Auditors, *Use Tax Credits by Home Rule Cities* (Denver, Colo.; May 11, 2001).
2. State and Local Tax Breakfast Group, *The Taxability of Delivery Services in Colorado* (Denver, Colo.; May 2002).
3. Western States Association of Tax Administrators (“WSATA”), *Current Local Tax Issues* (Breckenridge, Colo.; Sept. 2002).
4. BioBusiness Seminar Luncheon Series, *Colorado’s Biotechnology Refund* (Denver, Colo.; Dec. 2002).
5. Negotiated Mergers & Acquisitions and Sarbanes-Oxley Update, *Sales and Use Tax Consequences of Reorganizations, Separations, and Acquisitions* (Denver, Colo.; Colo. Bar Ass’n, Feb. 2003).
6. Tax for the Non-Tax Attorney, *Avoiding Tax Landmines in Your Practice, Colorado Taxes* (Denver, Colo.; Colo. Bar Ass’n, Mar. 2003).
7. American Bar Association Center for Continuing Legal Education, *Internet Taxation: Are Your Clients Liable?* (Business Law Today Live Teleconference, Apr. 2003).
8. 2003 Intellectual Property Institute, *Colorado Biotechnology Tax Credit Against Sales Tax* (Denver, Colo.; Colo. Bar Ass’n, June 2003).
9. State and Local Tax Breakfast Group, *The Taxability of Mixed Transactions in Colorado* (Denver Colo.; Nov. 2003).
10. 2003 State and Local Tax (SALT) Conference, *The Taxability of Software in Colorado* (Denver, Colo.; Colo. Bar Ass’n, Dec. 2003).
11. Advising High Technology Businesses, *The Taxation of E-Commerce: Multistate Principles* (Denver, Colo.; Colo. Bar Ass’n, Feb. 2004).
12. Colorado Sales and Use Tax for Manufacturers, *Manufacturing Exemptions*, (Colo. Springs, Colo.; National Business Institute, July 2004).
13. Annual Assessor’s Conference: Discussing how to present a case to the Indiana Board of Tax Review (Indianapolis, Ind.; Ass’n of Ind. Counties, Aug. 1, 2006).

14. Eighth Annual Property Tax Institute, *The Indiana Board of Tax Review: The Charity Border Patrol* (Indianapolis, Ind.; Ind. Continuing Legal Educ. Found.; Mar. 27, 2008).
15. *Top Ten Developments at the Indiana Department of State Revenue* (Indianapolis, Ind.; Ind. Continuing Legal Educ. Found.; Nov. 18, 2008).
16. Indianapolis Bar Association, *Top Ten Issues in Tax Litigation in Indiana* (Indianapolis, Ind.; IndyBar, Oct. 28, 2010).

Also, in order to educate attorneys and tax professionals, I have written 192 tax publications. I have attached a list of my publications. (**See Tab 13.**)

I have received two legal awards:

1. Harrison Legal Writing Award—Second Place, Indiana State Bar Association (Oct. 2, 2008), presented for the *Res Gestae* article, “The History of Indiana’s Property Tax Problems (Part 2): How Do You Spell Relief,” 51 *Res Gestae* 9 (Ind. State Bar Ass’n, Jan./Feb. 2008) (with John D. Snethen).
2. 2009 Humane Law Enforcement Award (Sept. 26, 2009), sponsored by the Fraternal Order of Police, National Association of District Attorneys, and the Humane Society of the United States. It was presented in Washington D.C. for the creative use of tax laws to close two puppy mills and rescuing 319 abused dogs.

B. Describe your efforts, achievements, or contributions (including written work, speeches, or presentations) concerning civic, political, or social issues.

During the height of property tax protests in Indiana, I was asked to present the keynote address at the Southeast District Meeting of Indiana Assessors at the Belterra Resort, Switzerland County. My presentation was entitled “What the Attorney General’s Office is Doing to Prevent Delays in the Property Tax Appeal System” (Florence, Ind.; Ass’n of Ind. Counties, Apr. 25, 2006).

C. List any memberships and offices you have held in civic or charitable organizations, including dates and descriptions of the purposes of the organizations and of your involvement.

N/A

D. List any memberships and offices you have held in professional organizations, including dates and descriptions of the purposes of the organizations and of your involvement.

In Colorado, from November 2000 to July 2004, when I left the state, I was a member of the executive council for the tax section of the Colorado State Bar Association. While on the section's council, I served one year as the secretary and began a second as its treasurer. If I had stayed in Colorado, I would likely have become the section's president. The tax section hosted a monthly CLE luncheon. For most of my tenure on the council, I had the duty of developing tax topics for the luncheons, finding topical speakers, and hosting the luncheon. I also edited the tax section's newsletter. I have attached two Colorado Tax Section newsletters that evidence my last position as the section's treasurer, its luncheon organizer, and the newsletter's editor. (*See Tab 14.*) In October 2001, the council gave me the honor of representing it and the tax section in Washington, D.C. at the annual meeting hosted by the ABA's National Association of State Bar Tax Sections.

In Indiana, for the past three years, I have served on the executive council for the tax section of the Indiana State Bar Association. As part of Indiana's council, I serve on the Tax Court Liaison Committee.

E. List any memberships you hold in social clubs or organizations. If any restrict its membership on the basis of race, sex, religion, or national origin, please describe your efforts within the organization to eliminate restrictions.

N/A

F. Indicate your experience teaching law, and provide the dates, names of institutions or programs, and a description of the subject matter taught.

From December 1991 to April 1993, I taught legal writing as part of the paralegal program offered by Indiana University and Purdue University in Indianapolis, Indianapolis, Indiana.

G. Describe your hobbies and other leisure activities.

My primary leisure activity is spending time with my two boys. We work out, swim, and play basketball at a local gym. We also visit amusement parks—our favorite of which is Cedar Point. My primary hobby and other leisure activity is writing tax articles. I have many thoughts about state and local tax (SALT) and an overwhelming desire to share them with those in the SALT profession. Writing articles satisfies this desire.

I also like long-distance bike rides and lifting weights. I hold a Second Dan black belt in Taekwondo, certified by the World Taekwondo Academy, the official governing organization established by the South Korean government.

IX. A. Provide names, addresses, and telephone numbers of three professional references other than those listed in Section VII. G.

1. Gregory Zoeller
Indiana Attorney General
302 West Washington Street
IGCS Fifth Floor
Indianapolis, Indiana 46204
(317) 233-3418 (work)
gfzoeller@atg.in.gov
2. Steve Carter
Former Indiana Attorney General
5760 Kilmer Lane
Indianapolis, Indiana 46250
(317) 997-7987 (cell)
stevecarter219@yahoo.com
3. Gary Secrest
Chief Deputy
Office of the Indiana Attorney General
302 West Washington Street
IGCS Fifth Floor
Indianapolis, Indiana 46204
(317) 232-6315 (work)
(317) 796-8832 (cell)
gary.secrest@atg.in.gov

B. Provide names, addresses, and telephone numbers of three personal references other than those listed in VII. G.

1. John Snethen
5662 Broadway Street
Indianapolis, Indiana 46220
(317) 234-2339 (work)
(317) 523-3276 (cell)
(317) 257-5493 (home)
2. Kelly Miklos
1627 Woodfield Drive
Greenwood, Indiana 46143
(317) 412-0966 (cell)
(317) 234-2967 (work)
3. Mike Ward

13819 Amblerwind Place
Carmel, Indiana 46074
(317) 408-9546 (cell)

C. List any lawsuits or legal proceedings in any jurisdiction, including bankruptcies and dissolutions, to which you have been a party. Provide dates, case numbers, names of other parties, and, if needed, a brief explanation.

Andrew W. Swain v. Ruby S. Menon, Cause No. 49D12-0806-DR-028533
Divorce
Filed July 8, 2008
Finalized September 5, 2008

D. If you ever have been arrested or cited for any violation of the law other than for routine traffic violations, provide dates, jurisdictions, and an explanation of the event and its resolution.

N/A

E. If you are or have been a member of the Bar of any other state, identify the jurisdiction and provide dates.

Colorado
December 16, 1998 to present.
Atty. No. 30305

I am also admitted to practice before the Northern and Southern Federal District Courts of Indiana, the Federal District Court of Colorado, the Seventh and Tenth Circuit Courts of Appeal, the U.S. Tax Court, and the U.S. Supreme Court.

F. If you have been disciplined or cautioned, formally or informally, by the Indiana Supreme Court Disciplinary Commission, by the Indiana Commission on Judicial Qualifications, by the Indiana Supreme Court, or by similar entities in any other jurisdiction, identify each instance by date, case number if applicable, and describe the circumstances and the nature of the outcome or resolution.

N/A

G. If you have any outstanding federal, state, or local tax obligations, please itemize and explain.

N/A

- X. A. Attach a recent statement from your physician describing your general physical condition.

I have attached the statement to the application. (*See Tab 15.*)

DATE

APPLICANT'S SIGNATURE

PRINTED NAME

WAIVER AND STATEMENT OF CONSENT

The undersigned applicant authorizes the release to the Indiana Judicial Nominating Commission or its staff or agents any records, reports, and documents, whether or not otherwise confidential, which may be requested by the Commission in the performance of its evaluations of candidates pursuant to I.C. § 33-27-3-2. The scope of this authorization extends to, but is not necessarily limited to, requests from the Commission for Federal, State or local tax records, criminal and driving histories from any jurisdiction, attorney and judicial disciplinary records from any jurisdiction, whether pending or closed, and credit reports and histories. The undersigned releases and discharges the Judicial Nominating Commission, its individual members, its employees, agents and representatives, the Indiana State Police, the Indiana Department of Revenue, the Indiana Supreme Court Disciplinary Commission and any other agency or person or their agents or representatives providing information to the Commission from any and all liability arising from the furnishing and use of information concerning the undersigned applicant.

The undersigned agrees and understands that the Indiana Judicial Nominating Commission or its members, agents, or employees, may interview or otherwise consult with members of the legal, judicial, and general community concerning the professional qualifications and the integrity of the applicant, that the name of the applicant will be released by the Commission upon its receipt of the application and this waiver, and that if, pursuant to I.C. § 33-27-3-2(d), the applicant is given further consideration as a candidate after the Commission's initial screening of candidates, or if no such screening occurs and all applicants are considered, the application will be made public. This waiver does not constitute an election by the applicant pursuant to I.C. § 33-27-3-2(g)(3)(C) to authorize the release of investigatory records which are excepted from public inspection pursuant to I.C. § 33-27-3-2(g)(1) and (2).

The undersigned agrees to immediately supplement this application upon any event or circumstance substantially affecting any answer provided in the application.

The undersigned acknowledges having read the Instructions attached to the application.

The undersigned agrees to resign from office or membership in any political organization upon submission of this application.

The undersigned affirms that, if nominated by the Judicial Nominating Commission to the Governor and thereafter appointed to this judicial office, the candidate will accept the appointment.

DATE

APPLICANT'S SIGNATURE

PRINTED NAME